

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY  
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUL 16 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

BRIAN KEITH WADE,

Appellant.

2 CA-CR 2007-0263

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063727

Honorable Stephen C. Villarreal, Judge  
Honorable Barbara Sattler, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Jonathan Bass

Tucson  
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender  
By David J. Euchner

Tucson  
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Brian Wade was found guilty after a jury trial of third-degree burglary and possession of burglary tools. The trial court suspended imposition of sentence and imposed a three-year term of probation. Wade now argues his conviction should be reversed because the admission into evidence of a recorded 911 telephone call violated his constitutional right to confront the witnesses against him and was inadmissible hearsay. We affirm for the reasons set forth below.

### **Factual and Procedural Background**

¶2 We view the evidence in the light most favorable to sustaining the jury's verdict, and in so doing we resolve all reasonable inferences from the evidence against the defendant. *State v. Cox*, 214 Ariz. 518, ¶ 2, 155 P.3d 357, 358 (App. 2007), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007).

¶3 At 2:41 a.m., a person identifying himself as "Carlos" called 911 to report two men breaking into a soda machine at an apartment complex. The caller gave physical descriptions of the men and said one was using a crowbar while the other acted as a lookout. A deputy from the Pima County Sheriff's Department arrived at the complex minutes later and found the crime still in progress. As he approached the vending machine, which was illuminated by overhead lights, the deputy heard "tinkering" sounds and discovered two men standing in front of the machine. The machine's lock had been broken off and the door was slightly ajar. One of the men, whom the deputy later identified as Wade, had his foot on a crowbar while the other man had his hand on the tool. The crowbar was lodged in the

change receptacle while both men exerted force as they apparently tried to pry the receptacle open.

¶4 The deputy stood within five feet of the men when he identified himself and ordered them to stop. Wade paused, looked at the deputy for two seconds, then fled on foot. In the chase that ensued, Wade repeatedly looked back at the deputy to yell insulting, resistant remarks, making eye contact several times. When Wade found that he couldn't climb over a fence within the apartment complex, he stopped and turned to confront the deputy. He then assumed a fighting stance and looked directly at the deputy for a considerable period of time before being shot with a Taser stun gun and arrested.

¶5 Wade filed a pretrial motion to preclude the 911 recording on evidentiary and constitutional grounds. The trial court denied the motion following a hearing. A different trial judge then allowed the 911 recording to be played for the jury at trial. The prosecutor referred to the 911 call in both opening statement and closing argument. The jury asked to hear the recording during deliberations but, before it could be provided, the jury found Wade guilty of third-degree burglary and possession of burglary tools.<sup>1</sup>

### **Discussion**

¶6 On appeal, Wade argues that the trial court erred in admitting the recording of the 911 call because (1) statements made by the caller were testimonial and thus their

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<sup>1</sup>The trial court granted a motion for judgment of acquittal on the third count in the indictment, burglary of a fenced residential yard.

admission violated the Confrontation Clause of the United States Constitution, (2) the state did not establish the unavailability of the caller, and (3) the court's findings did not establish that the statements would otherwise fall under a hearsay exception. Wade further claims this error was prejudicial insofar as the caller's statements "establish[ed] an important fact for the State's case," namely that a burglary occurred and that the description provided by Carlos corroborated the officer's identification of Wade as a perpetrator. Because we disagree that the recording affected the verdict, we need not address Wade's evidentiary or constitutional arguments.

¶7 We generally review evidentiary rulings for an abuse of discretion, *State v. Garza*, 216 Ariz. 56, ¶37, 163 P.3d 1006, 1016 (2007), but whether evidence was admitted in violation of the Confrontation Clause is a question we review de novo, *State v. Bronson*, 204 Ariz. 321, ¶14, 63 P.3d 1058, 1061 (App. 2003). We will not reverse a conviction on either basis if the challenged ruling would constitute harmless error. *See State v. King*, 212 Ariz. 372, ¶36, 132 P.3d 311, 319 (App. 2006); *State v. Beasley*, 205 Ariz. 334, ¶27, 70 P.3d 463, 469 (App. 2003). An error is harmless if a reviewing court can determine, beyond a reasonable doubt, that it did not affect the verdict. *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Put another way, a court may find harmless error when there is overwhelming other evidence of a defendant's guilt. *See, e.g., State v. Davolt*, 207 Ariz. 191, ¶64, 84 P.3d 456, 474 (2004).

¶8 Here, any error the trial court may have committed by admitting the 911 recording was harmless in light of the other admissible evidence. Although Wade stresses that the prosecutor referred to the 911 call both in his opening statement and closing argument and the jury asked to hear the recording while deliberating, this case was, as the prosecutor characterized it, “about a man getting caught red-handed.”

¶9 The sheriff’s deputy who responded to the call found Wade and his accomplice in the process of burglarizing a vending machine with a crowbar. The deputy’s testimony established that the men used the crowbar to “enter” the vending machine within the meaning of Arizona’s burglary statute,<sup>2</sup> and photographs admitted in evidence supported his testimony. The deputy also had ample opportunity to identify Wade, having seen his face repeatedly at a close distance and heard his voice throughout their encounter. Wade’s flight from, and aggressiveness toward, the deputy further suggested Wade knew he had broken the law. Contrary to Wade’s assertion, the recorded 911 call was not important to the case. To the extent it demonstrated that a burglary had taken place, that fact was overwhelmingly established by other evidence. To the extent the caller provided a physical description of the perpetrators, that evidence was cumulative and trivial compared to the officer’s observation of Wade at close range. Indeed, when the recording was finally offered to the jurors they “didn’t want it because they had reached a verdict.”

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<sup>2</sup>Third-degree burglary requires entry into a nonresidential structure, A.R.S. § 13-1506(A)(1), which is defined as “the intrusion of any part of any instrument . . . inside the external boundaries of a structure,” A.R.S. § 13-1501(3).

### Conclusion

¶10 Given the overwhelming evidence of Wade's guilt, we find any error the trial court may have committed in admitting the recording into evidence was harmless beyond a reasonable doubt.

¶11 We therefore affirm Wade's convictions and sentence.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge